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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 498.

RAFAEL SANCHO BONET, Treasurer of Puerto Rico,
Petitioner,

against

YABUCOA SUGAR COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

EF FOR RESPONDENT IN OPPOSITION.

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McCONNELL,
on the Brief.

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RAFAEL SANCHO BONET, Treasurer of Puerto Rico,
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vs.

YABUCOA SUGAR COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The only opinions of the insular District Court appear in the Order (R., 9-10) and Judgment (R., 16-17). The opinion of the insular Supreme Court on first hearing (R., 18) is reported in 50 P. R. R. (Spanish ed.) 962, and on reconsideration in 51 P. R. R. (Spanish ed.) 135. English editions of these volumes have not yet been published. The opinions of the judges of the Circuit Court are reported in 98 F. (2d) (Advance Sheets) 398-404. The three opinions of the Supreme Court of Puerto Rico in *Porto Rico Fertilizer Company* v. *Domenech* upon which its opinion in this case was based are attached hereto as Appendix B.

Jurisdiction.

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code of the United States, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938.

Questions Presented.

The only question involved is whether, after the Treasurer of Puerto Rico has denied a claim for credit and refund of amounts of income tax overpaid under the Income Tax Law of Puerto Rico of 1924, the taxpayer may maintain an action at law against the Treasurer for a refund of such overpayment, notwithstanding the fact that such payments were made voluntarily and without protest in accordance with the taxpayer's own income tax return.

Statutes.

Puerto Rican Income Tax Act of 1924 (Act No. 74, approved August 6, 1925). See infra, pp. 12, 14.

Puerto Rican Income Tax Act of 1921, sections 45, 46, 47. See appendix, p. 27.

Puerto Rican Income Tax Act of 1919, sections 63, 66. Appendix, p. 27.

Political Code of Puerto Rico, sections 308, 310, as amended by Act No. 75 of 1923 (Session Laws, pp. 604-606), see infra, p. 11.

Statement of Case.

The Yabucoa Sugar Company filed an income tax return with the Treasurer of Puerto Rico for the taxable year ended June 30, 1927, showing a taxable income of $201,879.29, and paid a tax calculated on that basis (R., 2). Thereafter the Treasurer notified the taxpayer that he had

determined a deficiency, and demanded the payment of an additional tax, which together with interest amounted to $1,301.51 (R., 2). Pursuant to the provisions of the local Income Tax Act and of the Political Code of Puerto Rico, the taxpayer appealed to the Board of Review and Equalization (R., 3). The Board undertook to examine the entire return filed by the taxpayer and, although in substantial agreement with the notice of deficiency appealed from, found that the taxpayer had failed to deduct certain amounts expended for repairs during the taxable year. In effect, the decision of the Board was to fix the taxpayer's income tax for the year in question at $6,803.66 less than the amount actually paid by the taxpayer (R., 3-6).

The taxpayer thereupon filed a claim for credit and refund of the amount so appearing to have been overpaid with the Treasurer in February 1930, *that is, within four years after the date of the payment of the tax,* as permitted by section 64(b) of the Income Tax Act (R., 6). The Treasurer considered the claim and disagreed with the Board in part, but did determine that there had been an overpayment of $525.56 (R., 6). The taxpayer again appealed to the Board of Review and Equalization within the time provided by law, and the Board reaffirmed its prior decision (R., 6).

The taxpayer then brought a suit in the nature of an action at law against the Treasurer in the Insular District Court of San Juan to recover the overpayment of $6,803.66 and interest (R., 1-7). The Treasurer demurred on two grounds (1) that the court was without jurisdiction because payment had not been made under protest, and (2) that the complaint did not state facts sufficient to constitute a cause of action (R., 8). The district court did not pass upon the second ground of demurrer, but held that it was without jurisdiction and, after denying reconsideration, entered judgment dismissing the complaint (R., 16, 17).

Taxpayer appealed to the Supreme Court of Puerto Rico (R., 17). The Supreme Court was at the time considering and reconsidering a related case, *Porto Rico Fer-*

tilizer Company v. *Domenech*, in which its first opinion was rendered on November 13, 1935, its second opinion on July 23, 1936, and its third and final opinion on February 26, 1937.

The opinions of the Court in that case are set out in full in the Appendix (infra, p. 29). The Supreme Court thought that this case was governed by the same principles as those governing the Porto Rico Fertilizer Case, and dismissed the appeal without opinion on July 28, 1936 (R., 18). Taxpayer applied for reconsideration, and on March 17, 1937, the insular Supreme Court gave this case separate consideration (R., 23, 24), denying reconsideration.

The grounds upon which the Supreme Court of Puerto Rico finally based its decisions both in this and in the Porto Rico Fertilizer Case were (1) that the only authority to maintain suit against the Treasurer of Puerto Rico for recovery of income tax payments is found in section 76 (a) of the Income Tax Act of 1924, (2) that such permission is conditioned upon payment under protest and the filing of suit within thirty days after payment, and (3) that taxpayers had not complied with either of these conditions. The Court went on to state that under the Act in question the refund of taxes erroneously collected "is a discretional matter in the Treasurer" (R., 24).

Both Yabucoa Sugar Company and Porto Rico Fertilizer Company appealed to the Circuit Court of Appeals (R., 25). The cases were heard on the same day, and for the purposes of its opinions, the Circuit Court consolidated the two appeals (R., 29-43). Each of the three judges wrote a separate opinion. Judge Bingham and Judge Wilson were in agreement that the judgment in the Porto Rico Fertilizer Case should be affirmed on the ground that no appeal had been taken to the insular Board of Review and Equalization and that the judgment in this case should be reversed. As petitioner correctly points out, the only distinction between the two cases is that in this case an appeal was taken to the Board of Review and Equalization, *which had determined that there had been an overpayment of in-*

e tax, while in the Porto Rico Fertilizer Case there had
n no appeal to the Board.

Judge Morton dissented, feeling that the judgments of
Supreme Court of Puerto Rico should in both cases be
rmed, *but with leave to the Porto Rico Fertilizer Com-
y to bring further proceedings by mandamus* (R., 43).
As to the grounds upon which the Supreme Court de-
ed the cases, there was no disagreement in the Circuit
rt. All of the judges were in complete agreement that
Supreme Court of Puerto Rico was clearly wrong in
ding that the duty of the Treasurer to credit or refund
rpayments of income tax was merely discretional. All
he judges were in agreement that the insular Supreme
rt was wrong in trying to find the taxpayer's remedy
ection 76 (a) of the income tax act. The only disagree-
t in the Circuit Court was as to whether the Supreme
rt, in spite of the erroneous grounds upon which it based
decisions, had reached the right *result*, and as to what
proper remedy of the taxpayers really was.

Statutes Involved.

A mere recital of the pertinent provisions of the Income
Act in question is sufficient to demonstrate beyond ques-
that the Supreme Court of Puerto Rico was wrong in
ng to find taxpayer's remedy in section 76 (a) of the
ute, and in holding that the Treasurer's duty in this
was discretional and not mandatory.

Section 53 of the Act fixes the last day to file returns
provides that the first installment of the tax must be
d on or before that date. In other words, the taxpayer is
ected to calculate the amount of his own tax, file his own
rn, and pay the first installment without any action on
part of the Treasurer of Puerto Rico.

Section 54 provides:

> "As soon as practicable *after the return is filed* the Treasurer shall examine it and shall determine the correct amount of the tax."

Section 55 provides:

"If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the excess shall *be credited* against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the excess shall *be credited or refunded* as provided in section 64."

Section 64 (a) and (b) provide:

"(a) *Where there has been an overpayment* of any income or excess-profits tax imposed by this Act, or by Income Tax Act No. 59 of 1917, Income Tax Act No. 80 of 1919, and Income Tax Act No. 43 of 1921, or any such Act as amended, the amount of *such overpayment shall be credited* against any income or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess *shall be refunded* immediately to the taxpayer.

"When a payment has been made of any income or excess-profits tax under the Income Tax Act No. 43 of 1921, as amended, for the calendar year 1924, or for any fiscal year ending in 1925, the amount of such payment *shall be credited* to any income or excess-profits tax then owed by the taxpayer pursuant to the provisions of this Act or of the acts hereinbefore amended in this subdivision or any amendment thereof, and any balance of such excess *shall be immediately reimbursed to the taxpayer.*

The italics have been supplied.

"(b) Except as provided in subdivision (c) of this section, (1) no such credit or refund shall be allowed or made after four years from the time the tax was paid, unless before the expiration of such four years a claim therefor is filed by the taxpayer, nor (2) shall the amount of the credit or refund exceed the portion of the tax paid during the four years immediately preceding the filing of the claim or, if no claim was filed, then during the four years immediately preceding the allowance of the credit or refund."

Section 76 (b) provides:

> "No suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and the regulations established in pursuance thereof."

Section 75 provides:

> "The Treasurer is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; and shall make report to The Legislature of Puerto Rico at the beginning of each regular session of all transactions under this section.

If the Treasurer's examination of the return shows that there has been an *underpayment*, section 57 directs him:

> "Section 57.—(a) If, in the case of any taxpayer, the Treasurer determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 30 days after such notice is mailed the taxpayer may file an appeal with the Board of Review and Equalization, alleging in writing and under oath the legal facts and grounds on which such appeal is based. . . ."

If the taxpayer is still dissatisfied after appeal to the Board of Review and Equalization, section 76 (a) tells him what to do:

> "Section 76.—(a) The decisions of the Board of Review and Equalization shall be final without preju-

dice to a reconsideration pursuant to law. The taxpayer shall pay under protest such tax as shall have been levied on him within the time specified and within 30 days subsequent to such payment under protest he may bring proper suit in a proper court, against the Treasurer of Puerto Rico.

"Said suits shall have preference on the court calendars. All defenses to be alleged by the defendant against the complaint shall be made at the same time in one sole answer, and the judge shall decide them at one hearing in strict order of precedence and the hearing shall be set promptly for final decision...."

It was from the unfortunate juxtaposition of sub-sections (a) and (b) of section 76 of the Act that the whole problem both in this case as well as in the Porto Rico Fertilizer Case has arisen.

Contentions of Petitioner.

Each of the three judges of the Circuit Court of Appeals appears to be in agreement as to the general scheme of the income tax act in question, and petitioner raises no issue as to this point. As stated by Judge Morton (R., 40, 41):

"There is no disagreement as to the general scheme of the statute under discussion. Income taxes imposed by it fall into two classes (1) those shown to be due on the face of the return, and paid voluntarily without objection or protest, (2) those collected on deficiency assessments. In regard to the latter there are careful and adequate provisions (Sections 57 and 76 (a)). If deficiency assessments are objected to the taxpayer may appeal to the Board of Review; if the Board of Review decides against him he must pay, and may sue in the courts to recover back the alleged illegal exaction.

"The present case does not relate to deficiency taxes; it concerns only taxes which were voluntarily paid without protest and deals only with claims for refund. *The statute provides very specifically for the return of overpayments without any requirement of*

objection or protest against the original payment. (Sections 53 (55), 64). These sections apply to voluntary overpayments, made presumably by mistake on the part of the taxpayer. It also authorizes and directs the Treasurer to repay erroneous or illegal collections and to report annually to the Legislature his transactions under this authority. (Section 75). While no express provision is made therefor it is not doubted that a person who has voluntarily overpaid his tax may apply to the Treasurer under these sections for a refund; *and it is clearly the Treasurer's duty if overpayment is established to make a proper refund.* The crucial question is who is to determine whether there has been overpayment of a tax voluntarily paid, *i. e.* to pass on such claims for refund." (Italics supplied.)

From this basis, petitioner now contends that notwithstanding the admittedly mandatory duty of the Treasurer to refund voluntary overpayments of income tax, it was the intention of the insular legislature to leave to the Treasurer's discretion the determination of the *right to recover an overpayment and the amount of the overpayment.*

He further contends, in support of the proposition that the Treasurer has the discretionary power of determining whether there has been an overpayment which ought to be refunded, that the Board of Review and Equalization has no power or jurisdiction even to consider questions of overpayments of income tax, and that the jurisdiction of the Board is limited to consideration of questions of deficiency assessments.

Petitioner's "primary question" (Petition, p. 2) as to whether a taxpayer may maintain an action in court against the Treasurer for refund of overpayments of income taxes paid voluntarily and without protest, is really dependent upon his principal contention that the Treasurer, and the Treasurer alone, is authorized to determine whether or not there has been an overpayment. Obviously, if the Treasurer has no such arbitrary power, then the question of the nature of the remedy becomes relatively unimportant, since the

taxpayer may, in default of a remedy by suit in the nature of an action at law, compel the Treasurer to decide his claim on the merits by writ of mandamus.

Points of Argument.

1. The insular Board of Review and Equalization has ample power under the Puerto Rican Income Tax Act of 1924 to determine the correct amount of any income tax owing or thought to be owing by any taxpayer.

2. The Puerto Rican legislature has provided in the insular Income Tax Act an effective remedy by suit in the nature of an action at law for the recovery of overpayments of income taxes, even though made voluntarily and without protest.

3. The decisions of the Supreme Court of Puerto Rico in this case are clearly wrong.

FIRST.

The insular Board of Review and Equalization has ample power under the Puerto Rican Income Tax Act of 1924 to determine the correct amount of any income tax owing or thought to be owing by any taxpayer.

Petitioner's contention that the Board of Review and Equalization has nothing to do with income tax problems, except such as arise in connection with notices of deficiencies (Petition, 24, 28), is entirely unfounded. This point was not mentioned in the opinions of the insular district court, in the opinions of the insular Supreme Court, or in the opinions of Judges Bingham and Wilson of the Circuit Court. It was mentioned for the first time by Judge Morton as one of his grounds for believing that the insular legislature had not granted an effective remedy by suit for the recovery of overpayments. (R., 41, 42).

Petitioner makes no argument as to the point, and seems to assume that the only provisions of law authorizing the Board of Review and Equalization to deal with income tax problems are found in the Income Tax Act of 1924 itself. (Petition, p. 19). This is apparently an oversight, *since it is patent from the basic provisions of Puerto Rican law that one of the prime reasons for constituting the Board of Review and Equalization was to deal with income tax problems of all kinds.*

The present Board of Review and Equalization was constituted by Act No. 75 of the insular legislature, approved August 2, 1923 (Session Laws, pp. 604-610), amending sections 308, 310, and 313 of the Political Code of Puerto Rico. By this act, the jurisdiction of the Board is fixed as follows:

> "Section 308.—For the purpose of revising the assessment and reassessment of real and personal property as provided by this Title, *and for the purpose of passing on all claims* made by taxpayers in respect to the assessment of their properties and the levying of property and *income taxes*, there shall be in the Department of Finance a permanent Board of Review and Equalization with an open office, *to be composed of the Treasurer of Porto Rico* and four persons versed in matters pertaining to the levying of taxes in Porto Rico, two of whom shall be agriculturists. . . .
>
> "Section 310.—Said Board of Review and Equalization shall meet in regular session in the months of January, May and September of each year, and in special session at such other times as may be necessary in the opinion of the chairman. At said meetings the board shall hear appeals received and shall decide questions arising before the board relative to the greater or lesser amount at which property may be assessed for purposes of taxation, or to the amount of taxes, or to exemptions from taxation, *or to fix the income tax of any taxpayer; and upon recording such determination, the board shall correct returns*, and *liquidate taxes to be levied on income returns filed*, in accordance with its decision, and shall report the facts to the Department of Finance for such corrections, cancellations or issuance of receipts as may

> be proper. Said board shall have power to strike out, lessen or increase the valuations made in any schedule returned to it, *whether or not complaint has been made in connection therewith*, and to decide all other complaints in regard to the levying of property and income taxes, and to correct all errors as such errors are brought to its attention. . . ." (Italics supplied.)

The approval of the Income Tax Act of 1924 (Act No. 74, approved August 6, 1925) did not deprive the Board of Review of the jurisdiction thus conferred upon it of dealing with all questions respecting income tax which might be presented to it, "whether or not complaint has been made in connection therewith." There is no general repealing clause in the Income Tax Act of 1924; nor are the provisions of the fundamental laws of Puerto Rico, embodied in the codes, repealed by implication. On the contrary, section 67 of the Income Tax Act of 1924 expressly provides:

> "Section 67. — All administrative, special, or stamp provisions of law, including the law relating to the assessment of taxes, so far as applicable, are hereby extended to and made a part of this Act."

Sections 308, 310, and 313 of the Political Code of Puerto Rico, so amended, form part of Title IX of the Code, which bears the title "Revenues," and are included in chapter I thereof, entitled "Assessment of Property." Prior to the amendment of 1923, there was no reference in the sections creating the Board of Review to any jurisdiction over income tax problems. It seems clearly to have been the intent of the Legislature of Puerto Rico to adapt income taxes into the general plan of the Political Code for the collection of taxes, insofar as applicable, and there can be no reason for assuming that the Board of Review was by implication divested of any of its broad, general powers over income tax questions.

If the Board of Review and Equalization has the power, as it obviously does, "to fix the income tax of any taxpayer," petitioner's argument that the insular legislature intended to give the Treasurer, and only the Treasurer, a

discretionary power to determine that same fact is plainly groundless, and petitioner's entire objection to the judgment of the Circuit Court becomes one of determining what sort of remedy the legislature intended the taxpayer to have.

There was no need for taxpayer in this case to allege the grounds upon which the Board of Review and Equalization acted in determining that there had been an overpayment. At most, petitioner's objection on this point is an argument that the complaint does not state facts sufficient to constitute a cause of action. The insular district court, as we have pointed out, did not pass upon that ground of demurrer to the complaint, but rested its decision upon the ground that it had no jurisdiction, nor was the point urged or considered either in the insular Supreme Court or in the Circuit Court of Appeals. It was in Judge Morton's opinion (R., 42, 43) that a suggestion was for the first time made that the complaint was insufficient through failure to state the grounds upon which the Board of Review and Equalization acted.

This objection is, we submit, unfounded, since the Board of Review and Equalization was plainly competent to make the decision which it did, and any objections which the Treasurer may have to its decision ought to be set up by way of answer. *In any event, taxpayer has had no opportunity to meet this objection, even if valid, by c endment of its complaint.*

SECOND.

The Puerto Rican legislature has provided in the insular income tax act an effective remedy by suit in the nature of an action at law for the recovery of overpayments of income taxes, even though made voluntarily and without protest.

Petitioner contends in Point I of his brief (Petition, 23) that the insular legislature was under no obligation to provide a recourse to the courts from the Treasurer's "deter-

mination" of "the correct amount of the tax." This is, of course, conceded.

However, in support of this proposition, petitioner cites *Dismuke* v. *United States*, 297 U. S. 167, omitting from the quotation on page 23 of petitioner's brief, the succinct definition of this Court as to what language is necessary to deprive one of recourse to the courts:

> **"But, in the absence of compelling language, resort to the courts to assert a right which the statute creates will be deemed to be curtailed only so far as authority to decide is given to the administrative officer."**

After using the language quoted on page 23 of petitioner's brief, including the omitted part to which we have just referred, the opinion of this Court continues:

> "If he is authorized to determine questions of fact his decision must be accepted unless he exceeds his authority by making a determination which is arbitrary or capricious or unsupported by evidence (citing cases), or by failing to follow a procedure which satisfies elementary standards of fairness and reasonableness essential to the due conduct of the proceeding which Congress has authorized (citing cases). But the power of the administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled. (Citing cases.)
>
> "The Commissioner is required by § 13, 'upon receipt of satisfactory evidence' of the character specified 'to adjudicate the claim.' This does not authorize denial of a claim if the undisputed facts establish its validity as a matter of law, or preclude the courts from ascertaining whether the conceded facts do so establish it."

There is no "compelling language" in the Income Tax Act of 1924 denying taxpayers a right of recourse to the courts. On the contrary, there is mandatory language re-

quiring the Treasurer of Puerto Rico to examine returns, to determine the correct amount of the tax, and to credit or refund any overpayment (Sections 54, 55, 64). Such language can indicate no intention on the part of the legislature to leave it entirely within the discretion of the Treasurer, or of the Board of Review and Equalization, or of any other administrative officer or body, to determine in his or its discretion whether there has been an overpayment of income taxes.

Dismuke v. *United States, supra;*
United States v. *Laughlin,* 249 U. S. 440.

The disputed provisions of the Income Tax Act in question are found in section 76 of the Act, which reads as follows:

"Section 76.—(a) The decisions of the Board of Review and Equalization shall be final without prejudice to a reconsideration pursuant to law. The taxpayer shall pay under protest such tax as shall have been levied on him within the time specified and within 30 days subsequent to such payment under protest he may bring proper suit in a proper court, against the Treasurer of Puerto Rico.

"Said suits shall have preference on the court calendars. All defenses to be alleged by the defendant against the complaint shall be made at the same time in one sole answer, and the judge shall decide them at one hearing in strict order of precedence and the hearing shall be set promptly for final decision.

"If the taxpayer, before resorting to the remedy granted by this section, believes there are in his case sufficient legal grounds and facts for applying again to the Board for a reconsideration, and he so sets forth in his petition to that effect, the Board may, in the exercise of its powers, grant such reconsideration if it so deems proper. This reconsideration shall be applied for in a written petition sworn to and subscribed by the taxpayer on whom the tax was levied, and shall be filed in the office of the Treasurer of

Puerto Rico within a period of 30 days from and after the date of notification of the decision of the Board.

"(b) No suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and the regulations established in pursuance thereof.

"(c) This section shall not affect any proceeding in court instituted prior to the enactment of this Act."

Each of the Judges of the Circuit Court is in agreement that sub-section (a) of this section should be read in connection with section 57 of the Income Tax Act; that is, as stated by Judge Morton in his dissenting opinion (R., 41):

"I agree with my brother Bingham that section 76 (a) relates only to deficiency assessments and payments, and is of no assistance."

Petitioner seems now to be in agreement with this interpretation of the statute, stating (Petition, 26):

"It is agreed on all hands that section 76 (a) relates only to deficiency taxes: * * *"

The question therefore resolves itself into one of determining what, if anything, the Legislature of Puerto Rico meant when it included section 76 (b) in the Income Tax Act of 1924.

In Point II of his brief petitioner analyzes section 76 (b) and contends that it does not constitute an affirmative grant of authority to taxpayers to bring suit in case of a denial of a claim for credit or refund, but rather that such authority

can be derived from section 76 (b) only by inference, or, as petitioner has characterized the sub-section, it is merely a "negative pregnant," since it provides only that

> "No suit or proceeding shall be maintained in any court for the recovery of any income tax * * * alleged to have been erroneously or illegally assessed or collected * * * *until* a claim for credit or refund has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal according to the provisions of law in that regard and the regulations established in pursuance thereof." (Italics supplied.)

In other words, petitioner's contention is that since the section provides only that no suit may be brought *until* certain preliminary steps are taken, it is not to be understood that such suits may be brought if those steps are taken! The argument speaks for itself.

Petitioner further argues (Petition, 25) that it was the intention of the Legislature in enacting section 76 (b) to refer to other provisions of law which do expressly permit recourse to the courts, or appeal to the Board of Review and Equalization, apparently following Judge Morton's argument (R., 41) in which he states with respect to section 76 (b):

> "The reference to suits in court and to appeals to the Board of Review although in the negative form might possibly have been construed as conferring by implication the jurisdiction now held to exist in the Board of Review and in the Courts if these references had not been limited as they are very expressly by the last clause in the sub-section. *It seems clear that provisions assumed to be in the statute are absent.* My brethren elaborate 76 (b) to include by construction what they suppose the omitted provisions to have been." (Italics supplied.)

There are, however, no such "omitted provisions." Section 64 (b) of the statute plainly provides for the filing of claims for credit or refund with the Treasurer, and, as we have pointed out, sections 308 and 310 of the Political

Code cover adequately the right of the taxpayer to appeal from a denial of such a claim for credit or refund to the Board of Review and Equalization. It can scarcely, therefore, be said that sub-section (b) of section 76 is an unfinished piece of legislation because of the limitation requiring the filing of a claim for credit or refund "and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and the regulations established in pursuance thereof."

The only alternative to the decision of the majority of the Circuit Court is to discard entirely, as meaningless, the entire sub-section (b) of section 76. This, of course, violates a cardinal principle of statutory construction.

D. Ginsberg & Sons v. *Popkin,* 285 U. S. 204, 76 L. ed. 704.

Under the scheme of the statute, which is now clear and admitted, but which the Supreme Court of Puerto Rico entirely failed to appreciate, section 76 (b) must refer to this very case. It is conceded that when the Treasurer determines that a taxpayer has *underpaid* his tax, he must give the taxpayer notice of his determination of a deficiency by registered mail (section 57), and the taxpayer is allowed 30 days within which to appeal to the Board of Review and Equalization. The decision of the Board of Review and Equalization is final; the tax is assessed, and the taxpayer may pay under protest and file suit to recover within 30 days after payment. Section 76 (b) has no application to this situation. In the case of underpayment no claim for credit or refund need be filed, and no further appeal to the Board need be taken.

If the taxpayer *overpays* his tax, it is conceded that the Treasurer has a mandatory duty to refund or credit the amount of the overpayment, provided a claim for credit or refund is filed within four years of the date of payment (Section 64 (b)). If section 76 (b) does not apply to this situation, it is mere surplusage, *since no claim for credit*

r refund is provided for except in the case of overpay-ents. What object could the legislature have had in pro-iding that no suit could be brought unless certain condi-ions were fulfilled if it did not intend that such a suit could e brought if the conditions were fulfilled? The Treasurer f Puerto Rico has always so construed the Act. Under he authority given him under section 68 of the Act the etitioner's predecessor in office issued and published on lay 17, 1926 regulations which are still in force with re-pect to the remedies granted by the Act to taxpayers. The ertinent provisions are as follows:

"Article 355.—Suits for Recovery of Taxes Erroneously Collected.—Suit or proceeding for the recovery of any income or excess-profits taxes alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected can be maintained by the taxpayer when the requirements of either of the following methods of procedure have been fulfilled:

"(1) When the taxpayer receives notice from the Treasurer that the income tax has been determined, he may: (a) make a voluntary payment of the amount so determined (without filing an appeal from the Treasurer's determination of the tax to the Board of Review and Equalization); (b) file a claim for refund or credit with the Treasurer within four years from the time the tax was paid (see section 64 (b)); (c) if the claim is denied by the Treasurer, the taxpayer may bring an ordinary action before a court of competent jurisdiction to recover the amount so paid.

"(2) When the taxpayer receives notice of the determination by the Treasurer of the tax to be paid, he may: (a) file an appeal to the Board of Review and Equalization; (b) if the decision is adverse he may petition for a reconsideration within thirty days; (c) if the reconsideration is denied, he may pay under protest; (d) if payment has been made, he may file a claim for credit or refund with the Treasurer and

with the Board of Review and Equalization; (c) within thirty days from the date of payment he may file a suit in the proper court to recover the amount paid under protest. See section 76 (a) and (b).

"The preceding paragraphs of this article outline the only manner in which a suit may be brought by the taxpayer for the recovery of taxes erroneously or illegally assessed or collected, or penalties collected without authority, or any sums excessive or in any manner erroneously collected, and strict compliance with these provisions by any taxpayer bringing such suit or proceeding is required. No suit for the purpose of restraining the assessment or collection of any taxes shall be maintained in any court. The word 'restraining' is used in its broad, popular sense of hindering or impeding, as well as prohibiting or staying, and the provision is not limited in its application to suits for injunctive relief. The prohibition of such suits can not be waived by any officer of the Government.

"Section 76 does not affect any proceeding in court instituted prior to the enactment of the Act."

This article of the Treasurer's regulations has never been revoked, and has for many years been relied on by taxpayers and their counsel.

Regulations promulgated by an officer charged with the duty of enforcing a statute are at least entitled to great respect and ought not to be overruled without cogent and persuasive reasons.

La Roque v. *U. S.*, 239 U. S. 62, 60 L. ed. 147;
U. S. v. *Morehead*, 243 U. S. 607, 61 L. ed. 926;
Tyson v. *Commissioner*, 68 F. (2d) 584.

There is in this case an even stronger reason for holding that the Treasurer's regulations may not be ignored. Section 76 of the insular Income Tax Act was re-enacted by the Legislature of Puerto Rico by Act No. 102, approved May 14, 1936. The only amendment was to add a proviso to sub-section (a) limiting the number of petitions for recon-

ation which might be considered by the Board of Re- and Equalization. *The effect of this re-enactment of on 76 was to confirm the regulations adopted by the surer pursuant to and explanatory of that section.*

Brewster v. *Gage*, 280 U. S. 327, 74 L. ed. 457.

etitioner states (Petition, 16) that these regulations "not pleaded, nor otherwise appearing in the record, not mentioned in the opinions of the insular courts, r the District Court or the Supreme Court." Petitioner pparently overlooked the fact that these regulations xpressly mentioned in the judgment of the District t (R., 16), and that the portions of article 355 of the ations applicable to this case are quoted in the motion econsideration filed in the District Court (R., 15). The e was discussed at length in the Circuit Court. We of no principle of law, nor does petitioner cite any principle, requiring regulations duly published under rity of statute to be pleaded, *particularly in an action st the officer whose predecessor in office promulgated ery regulations in question.*

THIRD.

he decisions of the Supreme Court of Puerto Rico s case are clearly wrong.

titioner cites authorities for the proposition that a on of the Supreme Court of Puerto Rico, construing a tatute of Puerto Rico, will be followed unless "clearly eous."

e general rule is not questioned. However, the appli- of the rule has never been carried to the point where rcuit Court of Appeals is expected blindly to follow the me Court of Puerto Rico.

ere has been a great deal of confusion in Puerto Rico conflicting and inconsistent decisions of the Supreme

Court of Puerto Rico in construing income tax legislation Judge Wilson states (R., 37):

> . . . "The Legislature by the Act of 1925 attempted to clarify certain provisions of the prior Acts.
>
> "However, the procedure under the Income Tax Act of 1919, 1921 and 1925 has been so confused by the decisions of the Supreme Court of Puerto Rico that, while ordinarily this Court will follow the interpretation of the law of Puerto Rico by the Insular Supreme Court, we think we are warranted in determining, without regard to the many conflicting decisions of the Insular Supreme Court, what seems to us to be the intent of the Insular Legislature in the passage of Act 74 of the Laws of 1925 so far as it affects the decision of these cases."

Fully to understand the error into which the Supreme Court of Puerto Rico has fallen it is necessary to review the history of income tax legislation in Puerto Rico.

Under the Income Tax Act of 1919, the Supreme Court of Puerto Rico held in *Serrallés* v. *Treasurer*, 30 P. R. R. 220, that a taxpayer might recover overpayments of income tax *even though the taxpayer had not paid under protest and even though the Treasurer of Puerto Rico had denied his claim.* The sole statutory authority for such a decision in this case was section 66 of the 1919 Act which provided:

> "That the Treasurer be, and he is hereby, authorized to remit, reimburse or make restitution for any tax or duty erroneously or unlawfully imposed or collected, as well as of the amount of any fine collected by error or without legal authority therefor.
>
> "That when proper claim has been made to the Treasurer of Porto Rico for the return, reimbursement or remittal of any duties or taxes erroneously or illegally levied or collected, as well as for the amount of any fines collected by error or without legal authority, if he refuses without reason to grant such a claim, the aggrieved party may appeal to the courts of justice, following therefor the procedure authorized and the proceedings established by Section 63 of this Act."

The next income tax act, that of 1921, suppressed all the provisions of the 1919 act authorizing refund or credit of overpayments, and under that law it was apparent that a taxpayer had no remedy either from the Treasurer or through the courts.

The succeeding act, that of 1924, and the one here in question, reinstated the duty of the Treasurer to credit or refund overpayments and provided that a taxpayer may file a claim for credit or refund within four years. The mandatory nature of the Treasurer's duty to refund is considerably clearer than in the 1919 Act. (Compare section 66 of the 1919 Act with sections 54, 55, 64 of the 1924 Act.)

After the 1924 Act became effective the Supreme Court of Puerto Rico held in *Compañía Agrícola de Cayey, Ltd.* v. *Domenech*, 48 D. P. R. (Spanish edition) 535 (a case involving $352.57 and therefore not appealable to the Circuit Court of Appeals), that although the 1924 Act provided for credit or refund and authorized the taxpayer to file a claim for credit or refund, the legislature had not seen fit to revive the right to sue *because the second paragraph of section 66 of the 1919 Act above quoted, had been omitted.* The Court gave no consideration to the fact that section 76 (b) of the 1924 Act was an entirely new provision which had not appeared in the 1919 Act at all, and was obviously intended to fill the place of the second paragraph of section 66 of the 1919 Act; nor did the Court give any consideration to the fact that the Treasurer of Puerto Rico had by his regulations for many years (see Art. 355, supra) construed section 76 (b) as granting a right to sue to recover voluntary overpayments.

What the legislature did when it adopted the 1924 Act is clear. Instead of following the wording of section 66 of the 1919 Act, the corresponding section 75 of the 1924 Act follows the wording of section 3220 of the U. S. Revised Statutes. Instead of following this with the second paragraph of section 66 of the 1919 Act, the 1924 Act accomplishes the same purpose in section 76 (b) of the 1924 Act by use of the language of section 3226 of the U. S. Revised Statutes.

The fundamental error into which the insular Supreme Court fell in the case of *Compañía Agrícola de Cayey* v. *Domenech, supra,* in this case, and in the case of *Porto Rico Fertilizer Company* v. *Domenech, supra,* was to fail to appreciate the sharp distinction which the legislature had drawn in the 1924 Act between the method for recovery of amounts paid under deficiency assessments, and those paid voluntarily by the taxpayer on the basis of his own return and calculations. This is apparent from a reading of the decision in the *Porto Rico Fertilizer Case, infra,* p. 29. What the Court there says is entirely applicable to the recovery of amounts paid under *deficiency assessment,* and had no bearing whatever on the situation there before the court. The court fails even to discuss the intent of the legislature in including section 76 (b) in the 1924 Act, or to advise taxpayers why the regulations of the Treasurer cannot be relied upon.

The language of the Court as to protest arises out of the same basic error. Having decided that section 76 (a) was the only portion of the statute granting a right to sue, and that section 76 (b) was merely a meaningless duplicity which ought to be discarded entirely, the Court said (R., 23):

> "We can realize that it would have been difficult or almost impossible at the time of payment of the taxes for it to know that it was paying the same in excess of the amount due. It is necessarily true that when a taxpayer makes a voluntary payment he is ordinarily not conscious that such a payment is an excessive one. . . .
>
> "*By legislative enactment* a payment under protest is a condition precedent to recovery by suit." (Italics supplied.)

It seems apparent that the only "legislative enactment" which the Court had in mind was section 76 (a), which clearly has no bearing on this case.

This is not the only case with respect to income tax procedure in which the insular Supreme Court has had difficulty.

The Court had previously held that Act No. 8 of 1927 (Session Laws, p. 122), a general statute providing for payment of taxes under protest and permitting suit against the Treasurer of Puerto Rico, had modified the income tax act by permitting taxpayers to file suit within one year instead of 30 days as provided in section 76 (a) of the Income Tax Act of 1924. In *Domenech* v. *Verges*, 69 F. (2d) 714, the Circuit Court of Appeals recognized with obvious reluctance that the decision of the insular Supreme Court was not clearly wrong. The Supreme Court then, in the *Porto Rico Fertilizer Case, infra*, reversed itself, in spite of the fact that its previous decision had stood unchallenged and even approved by the Circuit Court for five years, stating:

> "We realize the difficult situation, but a careful and thorough study of the question compels us to decide it differently from our decision in the said case of American Colonial Bank, supra, affirmed, but which was not really relied on with all its consequences in the other case of Soto Gras, supra, since the jurisdictional ruling established in the special law and not that of the general law was finally applied."

This lack of consistency in the decisions of the Supreme Court of Puerto Rico has been disastrous for the taxpayer. When the Supreme Court held that a taxpayer might bring suit within one year after payment, and this was recognized by the Circuit Court of Appeals, taxpayers who relied on this decision have been irreparably prejudiced by the subsequent decision of the Supreme Court expressly reversing itself and holding that suit must be brought within 30 days as provided in the Income Tax Act and not within one year as provided in the general law. Recovery was actually denied in *Méndez Hnos.* v. *Treasurer*, 51 P. R. R. 147 (Spanish edition) on this sole ground. Unfortunately, the amount involved was only $1,941.03, and the case hence unappealable.

We point this out only to demonstrate to this Court the utter confusion in which the decisions of the insular courts

have fallen with respect to recovery of income tax payments. If there were no other considerations, the fact that in the same decisions the insular Supreme Court has so obviously confused the meaning of subsection (a) and subsection (b) of section 76 of the Income Tax Act of 1924 ought not to be lightly passed over. We are not, of course, contending that the time within which to bring suit is in any way involved in this case.

The decision of the Supreme Court of Puerto Rico in this case is, we submit, not only clearly wrong, but the inconsistency and confusion in the decisions of the insular Supreme Court warranted the Circuit Court of Appeals in considering the entire situation and in determining for itself on the basis of a fair construction of the Income Tax Act of 1924 what rights and remedies the Legislature of Puerto Rico intended for taxpayers to have. The Circuit Court would not, we submit, have been justified in ignoring the plain error into which the Supreme Court has fallen not only in this but in many other cases.

CONCLUSION.

No question of public policy is involved in this petition for writ of certiorari. The decision of the majority of the Circuit Court is in harmony with the applicable decisions of this Court. The Supreme Court of Puerto Rico was clearly in error, and the interpretation placed upon the statute in question by the majority of the Circuit Court is correct, fair, and clear.

The petition for writ of certiorari should be denied.

Respectfully submitted,

EARLE T. FIDDLER,
Attorney for Respondent.

H. S. McCONNELL,
on the Brief.

San Juan, Puerto Rico,
January 10, 1939.

APPENDIX A.

Sections 61 and 63 of the Income Tax Act of 1919, Act No. 80, approved June 26, 1919.

Section 61.—That where the Treasurer dismisses a petition for reconsideration, or where he modifies his first decision though not in terms prayed for by the taxpayer, such taxpayer may, within fifteen days following the notification of such decision, appeal to the Board of Review and Equalization created by law, alleging in writing and under oath the facts upon which he bases his claim and the reasons of law in support thereof.

Section 63.—That the decisions of the Board of Review and Equalization shall be final. In such cases the taxpayer shall pay the tax imposed upon him, within the time fixed in Section 55, under protest, and he may interpose within ten days following such payment under protest, a sworn complaint against the Treasurer of Porto Rico and before a court of competent jurisdiction. Said cases shall be given preference and priority on the calendars of the courts, and all defenses against the complaint to be offered by the defendant shall be made at one time and in one bill, and the judge shall decide then *(sic)* at one sole hearing in strict order of precedence. The trial shall be promptly set for final decision and any unwarranted delay on the part of the plaintiff shall be sufficient grounds for a judgment of dismissal.

Sections 45, 46, and 47 of the Income Tax Act of 1921, Act No. 43, approved July 1, 1921.

Section 45.—When a return made by a taxpayer is modified by the Treasurer of Porto Rico, and such taxpayer does not concur in said officers' decision, such taxpayer may appeal to the Board of Equalization and Review created by law, within the fifteen days following service of notice of said decision, whether the same is served by an agent or by

mail, alleging in writing, under oath, the facts on which the claim is based and the legal principles adduced in its support.

Section 46.—That the Board of Review and Equalization shall fix the day and hour for the hearing of the case, at which hearing evidence shall be introduced and the argument of the appellant shall be heard. All powers vested under this Act in the Treasurer to summon witnesses, require the production of books and documents, strike balances and take inventories, and make investigations, are hereby conferred upon the Board of Review as to such cases as may be submitted thereto for its consideration.

Section 47.—That the decisions of the Board of Review and Equalization shall be final. The taxpayer shall pay the tax imposed upon him, within the time fixed, under protest, and he may interpose within twenty days following such payment under protest, a proper complaint against the Treasurer of Porto Rico and before the proper district court. Said cases shall be given preference and priority in the calendars of the courts, and all defenses against the complaint to be offered by the defendant shall be made at one time and in one bill, and the judge shall decide then *(sic)* at one sole hearing in strict order of precedence. The trial shall be promptly set for final decision and any unwarranted delay on the part of the plaintiff shall constitute sufficient ground for a judgment of dismissal.

APPENDIX B.

Opinions of the Supreme Court of Puerto Rico in the case of Porto Rico Fertilizer Company v. Domenech:

OPINION OF SUPREME COURT OF PUERTO RICO

Delivered by Associate Justice,

Mr. Aldrey.

San Juan, Puerto Rico, November 13, 1935.

Porto Rico Fertilizer Company, a domestic corporation, paid without protest to the Treasurer of Puerto Rico, in the years 1926, 1927, 1928, 1929, 1930, 1931 and 1932, the taxes collected from it as withholding agent of the Virginia-Carolina Chemical Corporation, a corporation of the United States of America. The payment made in 1929 was so made on the 11th of June of said year. On the 4th of October 1933 Porto Rico Fertilizer Company petitioned the Treasurer of Puerto Rico for the refund of all said taxes because the same had been erroneously collected and paid, alleging that, while from 1924 to 1931 it borrowed money from the Virginia-Carolina Chemical Corporation, all said loans were made in Richmond, State of Virginia, where the money was spent and interest paid on the loans with money that the Porto Rico Fertilizer Company had on deposit with banks in New York, and that the Virginia-Carolina Chemical Corporation has not even had an agent in this island nor a representative or office therein. The Treasurer refused the refunds requested as regards the payments made up to the 11th of June 1929 for the reason that four years had elapsed since said payments were made. He also refused the refund of the taxes paid after said date. Against said decisions of the Treasurer of Porto Rico Fertilizer Company filed suit in the San Juan District Court praying that the Treasurer be ordered to return all the said taxes, alleging the facts hereinbefore set forth. Two payments were made in 1926 and in the complaint there are alleged eight causes of action,

one for each payment made. Said complaint was demurred to on the ground that it did not allege facts sufficient to constitute a cause of action, and the court sustained said demurrer of the defendant because the claim made for the payments to which the first five causes of action refer has been made after more than four years had elapsed. Regarding the payments made after the 11th of June, 1929, which are the payments to which the last three causes of action refer, the court held that it could not order the refund thereof because the payments were not made under protest and because Porto Rico Fertilizer Company should have appealed from the refusal of the Treasurer to return said taxes to the Board of Review and Equalization before it could resort to the courts of justice. Judgment was entered in conformity with said decision and plaintiff took this appeal.

In the brief filed in this court plaintiff acknowledges that the first five causes of action have prescribed, wherefore it limits its argument on appeal to the contention that the judgment is erroneous as to the last three causes of action, alleging that it does not have to make the payments under protest nor to appeal from the Treasurer's decision to the Board of Review and Equalization.

Law No. 74 of 1925, which is an income tax law, in force at the time the payments the subject of this appeal were made, in its Section 75 empowers the Treasurer to remit, reimburse and refund any taxes which appear to have been erroneously assessed or for an excessive amount or in any manner erroneously collected, charging him with the duty of reporting to the Legislature, at the inception of each ordinary session, all the transactions authorized in said section.

The said law, in its Section 76 and under the title "Limitations upon suits and Proceedings by the Taxpayer", provides in its subdivision (a) that the decisions of the Board of Review and Equalization shall be final without prejudice to a reconsideration pursuant to law, and that the taxpayer shall pay under protest such tax as

shall have been levied on him, within the time specified and within thirty days subsequent to such payment under protest may bring proper suit in a proper court, against the Treasurer of Puerto Rico. Said term of thirty days was extended to one year by law No. 8 of 1927. Subdivision (b) of said Section 76 provides that no suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and the regulations established in pursuance thereof. The meaning of said subdivisions is that the income tax should be paid under protest before refund can be obtained, and that the suit against the Treasurer should be filed within a year, but that said proceeding shall not be maintained in any court unless, after payment under protest, a claim for refund shall have been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, before or after said period of one year. We have already stated that in the instant case the payment was not made under protest, as it should have been made.

On the other hand, it was necessary that appellant file an appeal with the Board of Review and Equalization from the decision of the Treasurer refusing the refund prayed for. The words of the law regarding appeal before the Board of Review and Equalization are sufficiently explicit to warrant the conclusion that they granted an appeal before the Board. Such an appeal was not taken.

For the reason that the payment was not made under protest and no appeal was taken to the Board of Review and Equalization, the judgment appealed from should be affirmed.

PEDRO DE ALDREY,
Associate Justice.

OPINION OF SUPREME COURT OF PUERTO RICO.

DELIVERED BY MR. CHIEF JUSTICE DEL TORO.

San Juan, Puerto Rico, July 23, 1936.

This is a suit for the recovery of taxes. Plaintiff, a corporation organized in accordance with the laws of this island, alleges that during the years 1924 to 1931 it borrowed certain amounts of money from the Virginia-Carolina Chemical Corporation, a Virginia corporation having no agent in this island; that the loans were contracted for and the money paid in Richmond, Virginia, and used outside of Puerto Rico in the purchase of materials used by plaintiff in its business, and that the principal as well as interest on said loans were paid in Richmond by means of drafts against funds deposited in New York.

Plaintiff then sets forth eight separate causes of action. The first one, copied literally, reads:

> "6. That on May 20, 1926 plaintiff was notified by the Treasurer of Puerto Rico that said official had assessed in the sum of $786.29 the amount of income tax payable by the Virginia-Carolina Chemical Corporation for interest paid to said corporation by plaintiff during the period of time from July to December, 1924, by virtue of the loans described in paragraph second of this complaint, notifying this plaintiff at the same time that it should pay said amount as withholding agent of the said Virginia-Carolina Chemical Corporation, and plaintiff alleges that on the 19th of June, 1926 it paid said sum of $786.29 to the Treasurer of Puerto Rico for the aforesaid taxes."

The remaining causes of action refer to the years 1925, 1926, 1927, 1928, 1929, 1930 and 1931, payments having been made respectively in 1926, 1927, 1928, 1929, 1930, 1931 and 1932.

Plaintiff further alleges that for the reason that neither the Virginia-Carolina Chemical Corporation nor the loans

in question ever had a situs in Puerto Rico, the collection of the tax on income earned and received outside of Puerto Rico was illegal; that in accordance with Section 75 of Law No. 74 of 1925 the Treasurer of Puerto Rico is authorized to return said taxes, and that on October 3, 1933, plaintiff asked the Treasurer for the return of said taxes and the Treasurer on the following day refused said petition as regards the payments referred to in the first, second, third, fourth and fifth causes of action, basing said refusal on subdivision (b) of Section 64 of said Law No. 74 of 1925, and on the 30th of the said month of October, 1933 he denied said petition also with regard to the payments referred to in the sixth, seventh and eighth causes of action.

Plaintiff prayed for judgment ordering the refund of the said taxes with interest from the date they were paid.

Defendant demurred to the complaint alleging lack of facts to constitute a cause of action, and the court sustained said demurrer granting plaintiff leave to amend its complaint.

Plaintiff petitioned for a reconsideration and judgment on the pleadings in case the reconsideration were denied. The District Court affirmed its original opinion and rendered judgment dismissing the complaint. And it is against this judgment that this appeal was taken. The assignment of errors, copied literally, reads as follows:

> "1. That the District Court erred in deciding that the complaint does not state facts sufficient to constitute a cause of action.
>
> "2. That the San Juan District Court erred in deciding that plaintiff should have appealed to the Board of Review and Equalization before making payment of the amounts claimed, and/or that said plaintiff should have paid said taxes under protest, and in deciding that because it did not do so said plaintiff has no cause of action.
>
> "3. That the San Juan District Court erred in deciding that plaintiff should have appealed to the Board of Review and Equalization from the refusals of the Treasurer of October 4 and 30, 1933, with

regard to the claim for refund filed by plaintiff with said official, and in deciding that because said appeals were not instituted plaintiff has no cause of action."

In its brief plaintiff-appellant admits that its first five causes of action have prescribed and confines itself to arguing its case as to the sixth, seventh and eighth causes of action. The Treasurer filed his brief and after hearing the case the appeal was decided by this court on November 13, 1935, affirming the judgment appealed from.

In the opinion on which the judgment is based the court stated in part as follows:

"Law No. 74 of 1925, which is an income tax law, in force at the time the payments the subject of this appeal were made, in its Section 75 empowers the Treasurer to remit, reimburse and refund any taxes which appear to have been erroneously assessed or for an excessive amount or in any manner erroneously collected, charging him with the duty of reporting to the Legislature, at the inception of each ordinary session, all the transactions authorized in said section. The said law, in its Section 76 and under the title 'Limitations upon suits and Proceedings by the Taxpayer', provides in its subdivision (a) that the decisions of the Board of Review and Equalization shall be final without prejudice to a reconsideration pursuant to law, and that the taxpayer shall pay under protest such tax as shall have been levied on him, within the time specified and within thirty days subsequent to such payment under protest may bring proper suit in a proper court, against the Treasurer of Puerto Rico. Said term of thirty days was extended to one year by Law No. 8 of 1927. Subdivision (b) of said Section 76 provides that no suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and

the regulations established in pursuance thereof. The meaning of said subdivisions is that the income tax should be paid under protest before refund can be obtained, and that the suit against the Treasurer should be filed within a year, but that said proceeding shall not be maintained in any court unless, after payment under protest, a claim for refund shall have been duly filed with the Treasurer and with the Board of Review and Equalization on appeal, before or after said period of one year. We have already stated that in the instant case the payment was not made under protest, as it should have been made. On the other hand, it was necessary that appellant file an appeal with the Board of Review and Equalization from the decision of the Treasurer refusing the refund prayed for. The words of the law regarding appeal before the Board of Review and Equalization are sufficiently explicit to warrant the conclusion that they granted an appeal before the Board. Such an appeal was not taken.

For the reason that the payment was not made under protest and no appeal was taken to the Board of Review and Equalization, the judgment appealed from should be affirmed."

For the reasons set forth plaintiff requested this court o modify "the opinion rendered in this case sustaining hat the doctrine established in the cases of *American Colonial Bank of Porto Rico* v. *Gallardo* and *Soto Gras* v. *Domenech* has not been modified in any manner; conforming he opinion and judgment in this case with the doctrine es-ablished in the aforesaid cases, or making the correspond-ng distinction, if possible, between the doctrine established n this case and the doctrine established in said other cases, or the purpose of avoiding serious confusion regarding he construction of the law and the authorities applicable nd to prevent serious confusion regarding the construc-on of the law and the authorities applicable and to prevent erious injury to taxpayers who up to this date have acted nd proceeded in good faith for the protection and defense f their rights in accordance with the decisions of this ourt in the aforementioned cases."

By order of January 14th last the court reconsidered its judgment of November 13, 1935, and set a new hearing for February 18, 1936. Both parties maintained their respective positions and Mariano Acoste Velarde, Esq., intervened in the case as amicus curiae, alleging, in fact, that in Puerto Rico "the payer of income taxes has the right, arising under Law No. 74 of 1925 and its regulations, to obtain the refund of what is unduly paid, within four years after income taxes are erroneously paid, by means of a claim for refund and the proper judicial action, even if the payment was not made under protest."

The ultimate facts to be considered for the decision of this appeal are, therefore, that plaintiff, on October 3, 1933, filed with the defendant Treasurer three claims for refund of income taxes that it had paid without protest in 1930, 1931 and 1932; that the Treasurer denied said claims on October 30, 1933 and on November 3, 1933, plaintiff appealed from said denial to the District Court of San Juan.

This being so, since the taxes paid correspond to and the payments thereof were made after the year 1925, the case is governed by Law No. 74 of 1925.

Section 75 of said law authorizes the Treasurer to remit, refund and return any taxes erroneously or illegally assessed or collected and penalties collected without authority, and any tax that appears to have been unjustly levied or for an excessive amount or for any reason erroneously collected.

The authorization cannot, in fact, be more ample. The Treasurer acts by himself. He is called upon to judge the merits of each claim. By said Section 75 he is only charged with the duty of rendering a report to the Legislature of Puerto Rico, at the inception of each regular session, of all the transactions carried to effect by him in the exercise of said authorization.

The taxpayer is called upon to render his income tax return and, as soon as practicable after the filing of said return, the Treasurer of Puerto Rico shall examine the same and determine the exact amount of the tax.

If the taxpayer declares no taxable amount, or if he does not file a return, the deficiency shall be the excess of the tax over the amounts previously assessed. When he so determines, the Treasurer shall notify the taxpayer and the latter, within thirty days from the date that the notice is deposited in the postoffice, may file an appeal with the Board of Review and Equalization stating the facts and grounds of his claim, in writing and under oath.

If the Board decides in favor of the taxpayer he shall not be liable for any part of the deficiency determined by the Treasurer and disallowed by the Board, and the Treasurer shall have the right, within the term of one year, to institute an action in a district court of competent jurisdiction, without assessment, for the collection of any part of the amount so disallowed. Of course, in such an action the taxpayer shall have the opportunity to defend himself, and judgment shall be rendered in accordance with the facts and the law.

The foregoing is more clearly provided by Sections 54, 56 and 57 of the law. See also Sections 62 and 64.

Section 76 (a) provides that the decisions of the Board shall be final and the taxpayer shall pay the tax under protest if he wishes to resort to the courts of justice.

Section 76 further provides that any actions so instituted by taxpayers shall have preference in the dockets of the courts, and the defendant shall set forth all his defenses at once and in one single writing and the case shall be promptly set and decided in one hearing.

Said section goes on to provide about the reconsideration by the said Board, and then commands that:

> "(b) No suit or proceeding shall be maintained in any court for the recovery of any income tax or excess-profits tax alleged to have been erroneously or illegally assessed or collected, or of any pecuniary penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Treas-

urer and with the Board of Review and Equalization on appeal, according to the provisions of law in that regard, and the regulations established in pursuance thereof."

Does this subdivision (b) mean that after the Treasurer denies the claim and said denial is affirmed by the Board a claim for refund has to be filed and if the Treasurer refuses it appeal again to the Board in order to be able to resort to the courts of justice?

Such is the meaning, at first glance, of the terms of the law itself, and we so decided in the opinion rendered as grounds for the judgment which was made ineffective by the order of January 14th last.

Nevertheless, a careful consideration of the matter carries us to the conclusion that it is not possible that such was the intent of the legislator. Why such duplicity? If the Treasurer denies and the Board affirms his denial and the taxpayer pays under protest, why resort again to the Treasurer and why appeal again to the Board?

This court had already said in the case of *American Colonial Bank of Porto Rico* v. *Domenech, Treasurer*, 43 D. R. R. 889, 891. "We also agree with appellant that, if after appealing to the Board of Review and Equalization a taxpayer pays under protest, it is not necessary, once payment is made, to resort to said Board. The legislative intent was to grant a cause of action after payment under protest. Nevertheless, when drafting the said opinion in this case, our previous opinions were overlooked and when our attention was called to that oversight a reconsideration was granted and the case was reopened for a new discussion and decision of the issues of the same."

It is therefore clear that when the taxpayer, feeling aggrieved by the income tax levied by the Treasurer, files his claim with said official and his claim is denied and he appeals to the Board, which also decides the case against him, and he then pays under protest, he may, within the term of thirty days fixed by Law No. 74 of 1925, Section 76, first paragraph, resort to the courts of justice without any other

preliminary requisite, that is, without having to file a petition for refund with the Treasurer and without having to appeal again to the Board of Review and Equalization.

As the law now stands, we do not find that the taxpayer of income taxes may resort to the courts of justice without paying under protest. If said taxpayer feels aggrieved by the tax assessed, he may, within thirty days after being notified, appeal to the Board and obtain that said Board overrule the deficiency determined by the Treasurer, as provided in Section 57 of said law, and he may, if the decision of the Board is against him, pay under protest and, within thirty days after payment, resort to the courts of justice availing himself of the right granted by Section 76 of the said law of 1925. He may also, though he has not paid under protest, if he considers that the tax was erroneously or illegally levied and is unfair and excessive, petition the Treasurer to refund to him the amount paid for said tax, in accordance with the authority granted to said official by Article 75 of the law, but if the decision of the Treasurer is against him he cannot appeal from the same to the courts of justice.

The non-existence of the appeal to the courts when payment is not made under protest is a matter already decided by this court in the case of *Compañía Agrícola de Cayey* v. *Domenech, Treas.*, 47 D. P. R. 535, 539, as follows:

> "It is perfectly clear that from 1921 to 1925 the Treasurer was not directly authorized to return income taxes, as he had been authorized under the law of 1919. The substantive remedy granted by the latter law was abrogated. Therefore, it may be said that the remedy by means of law suit also disappeared. From 1921 on the payment under protest was an express condition preliminary to the initiation of a law suit. Though the law of 1921, by its terms, did not abrogate the right to sue, it did establish the procedure whereby the refund of the taxes could be obtained. And such was the general understanding. We have before us an illustrative chart prepared by the Economic Commission of the Legislature containing the laws now in force, and the law of 1919 is

> omitted therefrom. Generally, though the time elapsed is not so long, taking into consideration the contemporary construction, the law of 1919 is no longer in force. Therefore, though the law of 1925 granted the substantive right of filing appeal with the Treasurer even if the taxes were not paid under protest, said law did not keep in force or revive the remedy granted by the law of 1919."

The decisions in *Serrallés* v. *Treasurer*, 30 P. R. R. 220, and *McCormick* v. *Bonner*, 44 D. P. R. 432, cited by the amicus curiae, are not applicable because they are based on the repealed law of 1919.

Therefore, under any phase that the case is considered, the judgment appealed from should be affirmed.

We would consider this opinion terminated if the question had not been brought up and discussed amply as to the influence that the decisions of this court in the cases of *American Colonial Bank* v. *Domenech, Treas.*, 43 D. P. R. 889, and *Soto Gras* v. *Domenech, Treasurer*, 45 D. P. R. 940, may and should have in the decision of this case.

The first of said cases has been cited and relied upon on the same question that the taxpayer who has filed a petition with the Treasurer, has appealed to the Board and has paid under protest, is not required to file a petition for refund with the Treasurer and appeal to the Board again before he may resort to the courts of justice. But that is not the question that we should now decide, but the following:

Notwithstanding the fact that this is a case of income taxes, this court decided that, in accordance with Law No. 8 of 1927 providing for payment of taxes under protest, the term within which the taxpayer could file suit was one year, and further said:

> "Section 3 of Law No. 8 provided a manner of payment and a right of action which were prospective and excluded previous methods. So that, a previous law providing for the filing of suit within thirty days after the decision of the Board of Review and Equalization was necessarily repealed." *American Colonial Bank* v. *Domenech*, 43 D. P. R. 890, 891.

Undoubtedly the court referred to subdivision (a) of Section 76 of the Law No. 74 of 1925.

In the second case, that is, the case of *Soto Gras, supra,* this court stated in part as follows:

> "After rendering our opinion in the above entitled case, appellant The People of Puerto Rico filed a motion for reconsideration. Said motion was duly heard and is now before us. Inasmuch as other questions have been sufficiently discussed or decided in our original opinion or in other decisions of this Court, the only question that should be considered is whether the San Juan District Court lacked jurisdiction because the amount claimed by plaintiff was less than $500 and because the suit should have been filed in a municipal court. The Government bases his contention on the fact that Section 76 of Law No. 74 of 1925 (page 401), in accordance with our opinion in the case of *American Colonial Bank* v. *Treasurer,* 43 D. P. R. 889, has been repealed by Law No. 8 of 1927 (Page 123) as regards payment under protest. In accordance with the law of 1925 it was clear that the taxpayer had to file his complaint in a district court. Nevertheless, if that law was repealed, the general provisions of law were applicable. We will assume for the time being, that up to 1925 a taxpayer had to file his claim for refund of taxes amounting to less than $500 in a municipal court. Our decision in the case of *American Colonial Bank* v. *Treasurer, supra,* was that the questions of procedure provided for in the law of 1925 had been abrogated by the law of 1927. We were not dealing with the question of jurisdiction. Therefore, we are inclined to agree with appellee's contention and with appellant's suggestion that both laws could co-exist regarding the question of jurisdiction if the later law did not show the intention to grant jurisdiction to a municipal court. If both laws may subsist, then the intention of the legislature of requiring that a taxpayer resort to a district court was perfectly clear in the law of 1926."

It was insisted that the District Court had jurisdiction. Both decisions were accepted and applied by the Circuit

Court of Appeals for the First Circuit as holding that Section 76 of Law No. 74 of 1925 has been repealed by Law No. 8 of 1927, and in the case of *Domenech* v. *Verges*, 69 F. (2d) 714, 716, said court stated as follows:

> "It is contended by counsel for the appellant that Act No. 8 of the Laws of 1927, providing for the recovery of taxes paid under protest, does not apply to the recovery of income taxes paid under protest; that it was a substitution for a general law enacted prior to the imposition of income taxes; and that, while it expressly repealed Act No. 9, approved June 23, 1924, and also Act No. 84, approved August 20, 1925, which acts provided generally for the recovery of taxes paid under protest, since it did not expressly refer to the Income Tax Act of 1924 approved August 6, 1925, in its repealing section, it should not be construed as repealing or modifying section 76(a) or (b) of that act relating to the recovery of income taxes paid under protest, though it repealed all conflicting laws or parts of laws.
>
> The Supreme Court of Puerto Rico (however, in the case of *American Colonial Bank of Porto Rico* v. *Juan G. Gallardo*, 43 D. P. R. 889 (Spanish Edition) decided July 26, 1932, and in the case of *F. Soto Gras* v. *Domenech, Treasurer*, in an opinion handed down December 20, 1933, on a motion for reconsideration), has held that the method of procedure provided for the recovery in section 76 of the Income Tax Act of 1924 of income taxes paid under protest, was repealed by Act No. 8 of the Laws of 1927.
>
> The interpretations of local law by the Supreme Court of Puerto Rico, unless clearly wrong, are followed by this court. The insular court is in a better position to interpret the intent of the local legislature than this court, and we are inclined to follow its construction in this instance, *De Villanueva* v. *Villanueva*, 239 U. S. 293, 299, 36 S. Ct. 109, 60 L. Ed. 293; *Cardona* v. *Quiñones*, 240 U. S. 83, 88, 36 S. Ct. 346, 60 L. Ed. 538; though we think Act No. 8 of the Laws of 1927 may be susceptible of another reasonable interpretation."

If such a construction subsists, everything we have herein stated and decided in this opinion by application of Section 76 of Law No. 74 of 1925 would fall by its own weight.

We realize the difficult situation, but a careful and thorough study of the question compels us to decide it differently from our decision in the said case of *American Colonial Bank, supra,* affirmed, but which was not really relied on with all its consequences in the other case of *Soto Gras, supra,* since the jurisdictional ruling established in the special law and not that of the general law was finally applied.

Our grounds for reaching the aforesaid conclusion are that Law No. 74 of 1925 is a special law, complete, referring to a certain tax—income tax—clearly worded, which should prevail over the general law referring to suits in cases of taxes paid under protest, especially when said general law contains a repealing clause which reads:

> "Section 6. Act No. 9 of June 23, 1924, and Act No. 84 of August 20, 1925, are hereby repealed, as well as all laws or parts of laws in conflict herewith; Provided, That any act, proceeding or right born under the protection of the laws hereby repealed, shall continue so protected by the provisions thereof, until its termination." (Laws of 1927, p. 124.)

The laws expressly repealed, i. e., No. 9 of 1924 and No. 84 of 1925, were also laws of a general character, as were Law No. 17 of 1920, repealed by Law No. 9 of 1924, and Law No. 35 of 1911—the first law on the matter—which was repealed by Law No. 17 of 1920.

The general system relative to suits in cases of taxes paid under protest being in force, and laws complete in themselves having been approved, the clear purpose of the legislator was that both laws should subsist within their own scope of action. If any doubt should subsist it would be dispelled by the action of the legislature itself in this year 1936 amending said section 76 of Law No. 74 of 1925 by adding thereto the following proviso: "Provided, that once the case is decided

upon a first reconsideration, no other proceeding shall be entertained by the Board, with the exception of what is provided in subdivision (b) of this section", which implies that it considered said section to be in force, notwithstanding the general law that it enacted in 1927 regarding payment of taxes under protest. See the cases of *Kessler* v. *Domenech, Treasurer*, 49 D. P. R. 196, and *Sucesión Puente* v. *El Pueblo*, 19 P. R. R. 560.

Wherefore, the motion for reconsideration is hereby dismissed and the judgment appealed from should be affirmed.

EMILIO DEL TORO,
Chief Justice.

OPINION OF SUPREME COURT OF PUERTO RICO

Delivered by Chief Justice Mr. DEL TORO.

San Juan, Puerto Rico, February 26, 1937.

The reconsideration of the judgment rendered in this case on the 23d of July, 1936, has been prayed for.

It seems advisable to remember that this appeal was originally decided by judgment of November 13, 1935, affirming the judgment appealed from, and that it was appellant itself who petitioned this court to modify "the opinion handed down in this case holding that the doctrine established in the cases of *American Colonial Bank of Puerto Rico* v. *Gallardo*, and *Soto Gras* v. *Domenech*, has not been modified in any manner; conforming the opinion and judgment in this case with the doctrine established in the aforementioned cases, or making the corresponding distinction, if possible, between the doctrine established in this case and the doctrine established in said other cases, for the purpose of preventing serious confusion as to the construction of the law and the authorities applicable and to prevent serious injury to taxpayers who up to this date have acted and proceeded for the protection and defense of their rights in

accordance with the decision of this court in the aforementioned cases."

Realizing the necessity of establishing a clear final rule on the matter, this court decided to reconsider and did reconsider its said judgment of November 13, 1935, and decided to hear the parties again, as it did hear them amply, in writing and orally, and also heard the amicus curiae Mariano Acosta Velarde.

And it was by virtue of said careful study by the attorneys and by the court that the latter finally came to face with the unavoidable question of a written provision of law which had to be made effective. Such is the gist, on a final analysis, of the lengthy opinion of which appellant now complains. It was on appellant's own request that the question was finally cleared, so that the injuries to which said appellant party refers in its motion for reconsideration may not continue to be occasioned.

We realized the difficulty of the question when we found that it had been decided to the contrary by the Circuit Court of Appeals for the First Circuit, and we so stated in the said opinion. 50 D. P. R. 405, 417.

Appellant now contends that the decision of the Circuit Court constitutes a rule of *stare decisis* which should be accepted and followed. It might be so but is not, in our judgment, under the concurring circumstances.

In the first place, the time elapsed is too short for an unassailable rule of *stare decisis* to have arisen; in the second place, in following the decisions of this Supreme Court the District Court acted in a manner that does not reveal its own conviction but deference to the local tribunal, and in the third place, the question is one of written law and once the law has been purified it is not susceptible of construction. Courts have no legislative powers.

The reconsideration prayed for should be denied.

Emilio del Toro,
Chief Justice.